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No. 88-844

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

WILLARD G. CHRISMAN,
Appellant,
VS.
THE TIMES MIRROR COMPANY,
Appellee.

On Appeal from The California Court of Appeal, Fourth Appellate District, Division One

MOTION OF APPELLEE THE TIMES MIRROR COMPANY TO DISMISS

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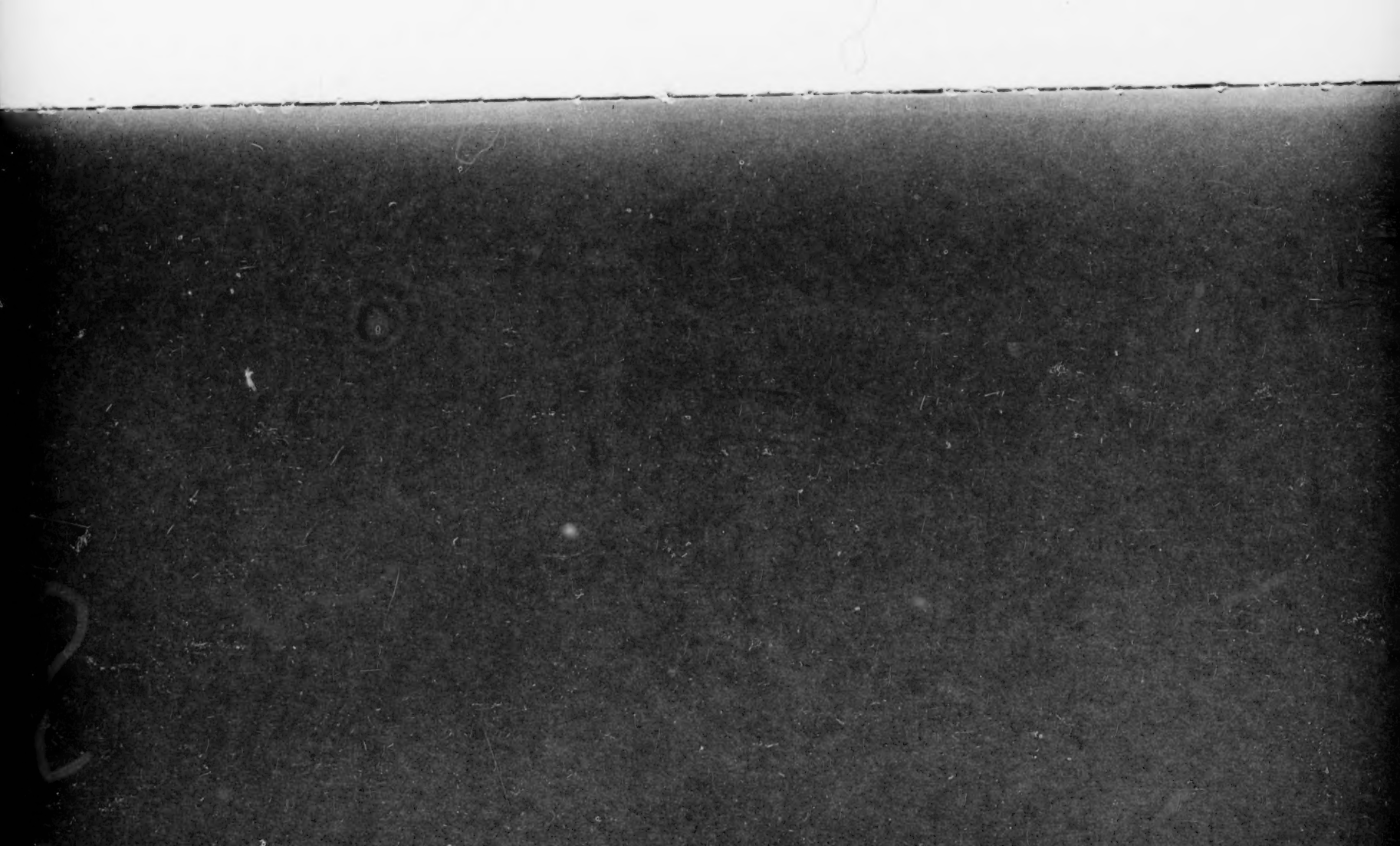

QUESTIONS PRESENTED

The questions presented by this motion to dismiss are:

1. Did the Court of Appeal decide any substantial federal questions which appellant properly raised there, so that this Court has jurisdiction under 28 U.S.C. § 1257(2) or (3) to review the decision of the Court of Appeal?

2. If the answer to the first question is affirmative, did the Court of Appeal uphold any California statute whose validity appellant properly drew into question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, so that this Court has jurisdiction under 28 U.S.C. § 1257(2) to review the decision of the Court of Appeal?[1]

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[1]28 U.S.C. § 1257 was amended June 27, 1988, to eliminate appeal jurisdiction of final judgments by state courts. This amendment was effective ninety days later, *i.e.*, on September 25, 1988, but did not affect the right to review or the manner of reviewing the judgment or decree of a state court which was entered before the effective date. The decision which appellant has asked this Court to review was filed on May 9, 1988; the California Supreme Court declined to review that decision on July 28, 1988.

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On Appeal from The California Court of Appeal, Fourth Appellate District, Division One

MOTION OF APPELLEE THE TIMES MIRROR COMPANY TO DISMISS

Pursuant to Supreme Court Rule 16, appellee The Times Mirror Company, d/b/a the Los Angeles Times ("Times Mirror"),* moves this Court for an order dismissing the appeal in this case from the decision of the California Court of Appeal for the Fourth Appellate District, Division One ("Court of Appeal"). The decision of the Court of Appeal was based solely on state law

*All parties to the proceedings below are named in the caption. Appellee The Times Mirror Company has an interest in the following subsidiaries and affiliates: Los Angeles Times-Washington Post News Service Inc., Smurfit Newsprint Corp., Graphic Controls Corp., and Tejon Ranch Company. Times Mirror has no other parent company, subsidiary (except wholly owned subsidiaries), or affiliate within the meaning of Supreme Court Rule 28.1

grounds. Appellant never properly raised in the Court of Appeal any substantial federal questions, the Court of Appeal decided no substantial federal questions, and this Court therefore has no jurisdiction under either 28 U.S.C. § 1257(2) or (3) to review the decision of the Court of Appeal.

Moreover, appellant cannot maintain an appeal under 28 U.S.C. § 1257(2) because the Court of Appeal did not uphold any California statute which appellant had properly challenged as being in conflict with federal law. This appeal should therefore be dismissed for lack of jurisdiction or for lack of a substantial federal question.

STATEMENT OF THE CASE

This libel action is based on seven articles published by Times Mirror between May 20, 1984, and October 7, 1984. The first article reported allegations that appellant, a naval commander, had been drunk when his ship ran aground in January, 1984. The second article, published August 29, 1984, reported that the Navy had decided to court-martial appellant on various charges related to the grounding. The third, fourth, fifth, sixth, and seventh articles reported on each day of appellant's court-martial, concluding with a report that appellant had been convicted of negligently hazarding his vessel but acquitted of all other charges. PA 1378-88.[2]

On July 25, 1986, Times Mirror brought a motion for summary judgment or summary adjudication of issues

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[2]Appellant apparently requested the Court of Appeal to certify and transmit to this Court the record below. Times Mirror has been unable to determine whether that record has in fact been provided to this Court. Citations in this motion are to the Petitioner's Appendix ("PA") filed by Times Mirror in the Court of Appeal. That Appendix included the pleadings filed in the trial court.

pursuant to California Code of Civil Procedure § 437c. In that motion, Times Mirror contended, first, that appellant had not made a correction demand as required by California Civil Code § 48a for the first three articles, and therefore that he was limited to any special damages caused by those articles. Second, Times Mirror contended that it was not the legal cause of appellant's alleged special damages, and therefore appellant's causes of action based on Times Mirror's first three articles must be dismissed. Third, Times Mirror contended, that appellant's causes of action as to the last five articles — those reporting on the court-martial — must be dismissed because the articles were fair and true reports of his court-martial and therefore absolutely privileged under California Civil Code § 47(4).[3] PA 1310-1497.

The trial court, in an order filed on June 26, 1987, denied Times Mirror's motion for summary judgment but summarily adjudicated two issues in Times Mirror's favor. PA 8-11. Pursuant to California Civil Code § 48a, the trial court found that appellant had not made a correction demand for the first three articles, and that appellant was therefore limited to any special damages caused by those articles. PA 9. The trial court also found that appellant's court-martial was a judicial or other official proceeding within the meaning of California Civil Code § 47(4). PA 10.

Appellant never sought review of the trial court's decisions against him.

Times Mirror, however, sought review of the trial court's rejection of its contentions that it was not the legal cause of appellant's alleged special damages, and

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[3]Times Mirror's motion for summary judgment advanced other grounds as well, but those grounds were not the basis for the decisions of the trial court nor of the Court of Appeal.

that its articles reporting on the court-martial were fair and true reports and therefore privileged under section 47(4). Times Mirror's Petition for Writs of Mandamus, Prohibition, and Review was filed with the Court of Appeal on July 10, 1987.

Initially, the Court of Appeal denied Times Mirror's writ petition without a hearing or an opinion, but the Supreme Court of California granted Times Mirror's Petition for Review and transferred the matter back to the Court of Appeal with directions to hear the matter. The Court of Appeal received briefs and then heard oral argument on February 9, 1988.

The Court of Appeal decision directing the trial court to enter summary judgment for Times Mirror was filed on May 9, 1988. The Court of Appeal denied appellant's Petition for Rehearing on May 26, 1988, and the Supreme Court of California denied appellant's Petition for Review on July 28, 1988. Pursuant to the Court of Appeal's decision, judgment was entered for Times Mirror on August 26, 1988. Written notice of entry of judgment was served on appellant by mail by Times Mirror on September 7, 1988. Appellant took no appeal from that judgment in the California courts, and the time to do so has expired. Cal. R. Ct. 2 (notice of appeal must be filed within sixty days after service of written notice of entry of judgment).

The unpublished decision of the Court of Appeal is contained in appellant's Appendix, at i. Under California law, an unpublished decision of a Court of Appeal has no precedential value and may not be cited as authority. Cal. R. Ct. 977. The order of the California Supreme Court denying review also is contained in appellant's Appendix, at iii. Review by the California Supreme Court of a Court of Appeal decision is discretionary. Cal. R. Ct. 29. Denial of review is not an expression of the opinion of the

California Supreme Court on the merits. Advisory Committee Comment (1985), Cal. R. Ct. 28.[4]

SUMMARY OF ARGUMENT

This appeal is from a decision of the Court of Appeal ordering summary judgment for Times Mirror on two grounds. First, the Court of Appeal decided, based solely on California law, that Times Mirror was not the legal cause of appellant's alleged special damages resulting from Times Mirror's first two articles,[5] and therefore appellant's causes of action based on those articles must be dismissed. Appellant's Appendix, at i. Second, the Court of Appeal decided, again based only on California law, that the statutory privilege provided by California Civil Code § 47(4) protected Times Mirror's last five articles, and therefore appellant's causes of action based on those articles must be dismissed. *Id.* These are solely state law issues.

Any review of the Court of Appeal decision will show that the Court of Appeal decided no federal questions

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[4]Although appellant's Jurisdictional Statement is entitled "Appeal From the Judgment of the Court of Appeal," appellant repeatedly, but erroneously, states that the California Supreme Court upheld the constitutionality of the correction statute or unconstitutionally extended the neutral report privilege. See, *e.g.*, Jurisdictional Statement, at i-iii. The California Supreme Court did no such thing; it simply denied review. Appellant's appeal is from the Court of Appeal decision, not the California Supreme Court's discretionary denial of review. See, *e.g., Interstate Circuit, Inc., v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

[5]Times Mirror's third article was encompassed both by the trial court's ruling that appellant was limited to his special damages and by the Court of Appeal decision that the articles on the court-martial were protected by the fair and true report privilege.

whatsoever. This demonstrates that no such questions were properly before the Court of Appeal:

> [When] the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Street v. New York, 394 U.S. 576, 582 (1969).

Appellant has the burden of showing that federal questions were raised below by specifying in his statement of the case "the stage in the proceedings (both in the court of first instance and in the appellate court) at which the questions sought to be reviewed were raised; the method or manner of raising them; and the way in which they were passed upon by the court."[6] Sup. Ct. R. 15.1(g); see also Sup. Ct. R. 21.1(h). Appellant has not and cannot meet this burden here. Because no substantial federal questions or federal challenges to the validity of a California statute were before the Court of Appeal, this appeal must be dismissed.

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[6]To demonstrate that the arguments appellant advanced in the California courts are correctly described in this motion, Times Mirror is lodging concurrently with the filing of this motion copies of the appellant's Memorandum of Points and Authorities in Response to and in Opposition to Petition for Writs of Mandamus, Prohibition and Review, filed with the Court of Appeal July 24, 1987 ("Appellant's First Opposition"); appellant's Second Response of Real Party in Interest, filed with the Court of Appeal December 7, 1987 ("Appellant's Second Opposition"); and appellant's Petition for Review, filed with the California Supreme Court June 16, 1988 ("Appellant's Petition").

I.

THIS APPEAL IS NOT WITHIN THIS COURT'S CERTIORARI OR APPEAL JURISDICTION[7]

A. As To California Civil Code § 48a, No Substantial Federal Questions Or Federal Challenges To Its Validity Were Properly Before The Court Of Appeal, So This Court Has No Jurisdiction.

In this Court, appellant asserts two federal claims about California's correction statute. That statute, California Civil Code § 48a, limits a defamation plaintiff's recovery to his special damages unless he makes a timely correction demand. Cal. Civ. Code § 48a (Deering 1971).

Appellant first claims that section 48a should not have been applied to him because of the Soldiers' Act.[8] Jurisdictional Statement, at 34-35. Appellant raised this issue in the trial court, claiming that because of the Soldiers' Act, his correction demand letter, sent two and one-half years after Times Mirror's articles were published, was timely. PA 319-20. The trial court ruled that the Soldiers' Act did not relieve appellant from making a timely correction demand as to Times Mirror's first three articles. PA 25-29. The trial court then granted Times Mirror's motion for summary adjudication, holding that appellant was limited to his special damages, if any, pursuant to section 48a because he had never made the required correction demand. PA 9.

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[7]Because this Court may treat appellant's papers as a petition for writ of certiorari (28 U.S.C. § 2103), Times Mirror will address the jurisdictional requirements under both 28 U.S.C. § 1257(2) and (3).

[8]The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. §§ 501 *et seq.* will be referred to as the "Soldiers' Act" for convenience.

Appellant never sought review in the California courts of this summary adjudication. California law is controlling on whether a federal question was properly preserved in the California courts. *John v. Paullin,* 231 U.S. 583, 585 (1913). Under California law, any issue as to which summary adjudication has been granted is conclusively established at the trial of the action. Cal. Civ. Proc. Code § 437c(f) (Deering Supp. 1988). Appellant could have sought review of the summary adjudication that he was limited to his special damages within ten days after service upon him of written notice of entry of the order (that is, on or before July 10, 1987). Cal. Civ. Proc. Code § 437c(*l*) (Deering Supp. 1988). Appellant did not do so.

Under California law, this requirement is jurisdictional; appellant's failure properly to seek pre-judgment review of the summary adjudication precluded the Court of Appeal from considering the merits of the trial court's ruling as to the Soldiers' Act. *Abadjian v. Superior Court,* 168 Cal.App.3d 363, 369-70, 214 Cal.Rptr. 234 (1985) (the substantive merit of issues summarily adjudicated by the trial court may not be reviewed by an appellate court prior to judgment unless the party affected by the summary adjudication filed a writ petition within the time limits set by California Code of Civil Procedure § 437c(*l*)). See also *Barth-Wittmore Insurance v. H.R. Murphy Enterprises, Inc.,* 169 Cal.App.3d 124, 136-37, 214 Cal.Rptr. 894 (1985) (compliance with the time requirement of section 437c(*l*) is mandatory if a party wishes to obtain pre-judgment review); *Sturm, Ruger & Co. v. Superior Court,* 164 Cal.App.3d 579, 581-82, 210 Cal.Rptr. 573 (1985) (the time limitation for seeking review by writ is jurisdictional).

In fact, in his initial opposition in the Court of Appeal to Times Mirror's writ petition, appellant did not even attempt to challenge the merits of the trial court's ruling

on the Soldiers' Act, claiming only that causation should be left to a jury. Appellant's First Opposition, at 14-22. Later, appellant did claim that the combination of applying section 48a and making a legal determination on causation violated his rights by denying him a jury trial. Appellant's Second Opposition, at 19-20. This claim — made only in opposition to Times Mirror's writ petition — was insufficient under California law to bring the merits of the trial court's ruling on section 48a before the Court of Appeal. *Abadjian,* 168 Cal.App.3d at 369-70 (appellate court may not review the merits of trial court summary adjudication except when a timely writ petition is filed even though the party affected by the adjudication challenges it in opposition to another party's writ petition).

Appellant also could have sought review of the trial court's decision by appealing the final judgment entered by the trial court on August 26, 1988. Cal. Civ. Proc. Code § 904.1, § 904.4 (Deering Supp. 1988 and 1988 Cal. Adv. Legis. Serv. 789). No appeal was taken in the California courts, and the time for taking such an appeal has expired. Cal. R. Ct. 2.

Because appellant never sought review by writ or appeal of the trial court's decision that section 48a applied to him regardless of the Soldiers' Act, the Court of Appeal never had that issue before it, and it never decided any such issue. Appellant's Appendix, at i. Therefore, that decision is not subject to review in this Court.

Appellant also claimed in the trial court that limiting him to his special damages would be "unfair and unconstitutional." PA 582-86. Despite appellant's constitutional claims, the trial court found that section 48a limited appellant to his special damages as to Times Mirror's first three articles. PA 9. Appellant never sought review by writ or appeal of this decision by the trial court. For the reasons just stated, this issue was not properly

raised in the Court of Appeal nor was it decided by that court. Therefore, this Court has no jurisdiction to review appellant's claims as to section 48a.

B. In Any Event, Appellant's Claims About Section 48a Would Not Constitute Grounds For An Appeal.

Jurisdiction by appeal exists only when (1) the judgment sought to be reviewed came in a case "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States" and (2) the judgment reflected a "decision in favor of . . . validity" of the challenged statute. 28 U.S.C. § 1257(2) (West 1966 and West Supp. 1988).

As to the first condition, "[i]t is essential to . . . jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 562 n.4 (1980) (quoting *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185 (1945)). As this Court explained in *Richmond Newspapers*, appellants there had never explicitly challenged the state statute's validity, but instead had argued that their constitutional rights prevented the state court from closing a trial pursuant to a Virginia statute. "Given appellants' failure explicitly to challenge the statute, we view these arguments as constituting claims of rights under the Constitution, which rights are said to limit the exercise of the discretion conferred by the statute on the trial court." 448 U.S. at 562 n.4.

Such claims, that a state's actions have deprived an individual of his rights under federal statutes or the federal constitution, are claims that may be presented to

this Court only by certiorari, not by appeal. See, *e.g.*, *Rohr Aircraft Corp. v. County of San Diego*, 362 U.S. 628, 629-30 (1960) (an attack on the grounds that a tax assessment infringes the taxpayer's federal rights is not grounds for an appeal); *Kulko v. Superior Court of California*, 436 U.S. 84, 90 n.4 (1978) (argument that due process rights preclude state court from exercising jurisdiction is not grounds for appeal); compare *McCarty v. McCarty*, 453 U.S. 210, 219 n.12 (1981) (jurisdiction by appeal is proper when the appellant explicitly claimed that a state statute was preempted by federal law).

Appellant's first claim in this Court is that, by limiting him to his special damages, the California courts have deprived him of the protection afforded him by the Soldiers' Act. Jurisdictional Statement, at 34. This argument is a claim that appellant's federal rights have been infringed, and therefore is not grounds for an appeal. *Rohr*, 362 U.S. at 629-30.

Appellant next contends that, by limiting him to his special damages, the California courts have deprived him of some undefined constitutional right which he apparently believes *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) has enunciated for private figure defamation plaintiffs. Jurisdictional Statement, at 35-36. This argument amounts to a claim that appellant's constitutional rights have been violated, and therefore is not grounds for an appeal. *Richmond Newspapers*, 448 U.S. at 562 n.4.

Finally, appellant contends that, by limiting him to his special damages and determining as a matter of law that Times Mirror did not cause those damages, the California courts have unconstitutionally denied him the right to a jury trial on general damages. Jurisdictional Statement, at 37-41. This argument apparently is a claim that appellant's federal constitutional right to a jury trial has been

violated, and therefore is not grounds for an appeal. *Richmond Newspapers*, 448 U.S. at 562 n.4.

Thus, even if appellant's claims about California Civil Code § 48a had been properly raised and even if they had been decided by the California Court of Appeal, they would not sustain an appeal because there was no decision implicitly or explicitly upholding the validity of a state statute in the face of a proper federal challenge. On this basis alone, the appeal should be dismissed.

C. As To California Civil Code § 47(4), Appellant Raised No Federal Questions Below About Application Of California's Statutory Fair And True Report Privilege; Review Of The Court Of Appeal Decision Is Therefore Not Within The Jurisdiction Of This Court.

Appellant implicitly concedes that the only California statute whose validity he even attempted to challenge below on federal grounds was the California correction statute, Civil Code § 48a. Jurisdictional Statement, at 3-4. He has not even asserted appellate jurisdiction to review the Court of Appeal decision as to California Civil Code § 47(4). Cal. Civ. Code § 47(4) (Deering Supp. 1988).

Nonetheless, appellant now contends in this Court that application of the statutory fair and true report privilege to him was unconstitutional. His apparent claim is that, because of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), he has some federal constitutional protection because he is a private figure.[9] Jurisdictional Statement, at 43-45.

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[9]The privilege afforded by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) was not asserted by Times Mirror in this proceeding. Appellant's status as a public or private figure was therefore irrelevant to the motion before the California courts. Nevertheless, it is clear that as the commander of a Navy vessel, appellant would be a

In the Court of Appeal, appellant treated the application of the statutory fair and true report privilege solely as a question of state law. Appellant's First Opposition, at 26-34; Appellant's Second Opposition, at 20-25. As appellant recognized below, the Court of Appeal decision that California Civil Code § 47(4) protected Times Mirror's articles about appellant's court-martial was based on its interpretation and application of the California statutory privilege. Appellant's Petition, at 13-26.

There is no jurisdiction to review this state law determination by the Court of Appeal even if this Court decides that the papers on appeal should be regarded as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103 (West 1982). The essential element to this Court's jurisdiction, either by certiorari or by appeal, is that a substantial federal question has been properly raised in the state court. No federal question as to the application of California Civil Code § 47(4) was ever raised in the Court of Appeal, so this Court has no jurisdiction to review the Court of Appeal decision as to section 47(4).

In addition, appellant has not even attempted to meet the standards for certiorari. Besides the need for raising a substantial federal question, appellant must show that the decision below conflicts with the decision of another state court or a federal court of appeals, or he must demonstrate an important but unsettled question of federal law or a federal law determination that conflicts with decisions of this Court. Sup. Ct. R. 17. There is no such showing, nor even an attempt to make such a showing, here.

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public official for purposes of the *New York Times* privilege. *Arnheiter v. Random House, Inc.*, 578 F.2d 804, 805 (9th Cir. 1978).

D. Review Of The Court Of Appeal Decision On Causation Is Not Within The Jurisdiction Of This Court Because No Federal Questions About Causation Were Raised Below.

Although appellant has acknowledged implicitly that he raised no causation issues that would create appellate jurisdiction (Jurisdictional Statement, at 3-4), he nonetheless contends that the California courts unconstitutionally expanded the neutral reportage doctrine "by implication" by denying him a jury trial on the issue of causation. Jurisdictional Statement, at 42. In addition to his failure to make this claim in any California court, appellant does not specify what action by the California courts was unconstitutional, what constitutional provision was violated, nor even what constitution — state or federal — was violated.

The "neutral reportage doctrine" was not the basis for the Court of Appeal decision on any point. Appellant's Appendix, at i. Times Mirror never relied on the neutral reportage doctrine below. Instead, the Court of Appeal decision on causation was based solely on state law, as appellant recognized in his Petition for Review to the Supreme Court of California. Appellant's Petition, at 4-9. Therefore, there is no jurisdiction to review the Court of Appeal's state law determination as to causation.

II.

APPELLANT CAN RAISE NO SUBSTANTIAL FEDERAL QUESTION ABOUT CALIFORNIA CIVIL CODE § 48a BECAUSE THE SOLDIERS' ACT HAS NO APPLICATION TO CALIFORNIA'S CORRECTION STATUTE

As pointed out in Section I(A), appellant never properly sought review of the trial court's determination that

the Soldiers' Act did not preclude application of California's correction statute to him. Therefore, he cannot bring that issue before this Court. Even if he could, an examination of the Soldiers' Act shows that it does not relieve appellant from complying with section 48a.

In his pleadings in the trial court, appellant first conceded that he had made no timely demand for correction of Times Mirror's first three articles as required by California Civil Code § 48a. PA 603. That section requires that a correction be demanded within twenty days of a plaintiff's knowledge of an alleged defamation. Cal. Civ. Code § 48a (Deering 1971). If no correction is demanded, the plaintiff is limited to his special damages. *Id.* After filing his first opposition to Times Mirror's summary judgment motion, appellant, citing the Soldiers' Act, sent Times Mirror a letter requesting correction of allegedly libelous statements in the first two articles. PA 319-20, 333. This letter came two and one-half years after the articles were published. *Id.* The trial court correctly found that the Soldiers' Act did not relieve appellant from complying with section 48a, that appellant had not made a timely correction, and that appellant was therefore limited to his special damages. PA 9, 25-29. The trial court's decision was correct.

Appellant now apparently relies on section 510 of the Soldiers' Act. That section sets forth the purpose of the Act: "to suspend enforcement of civil liabilities, *in certain cases* . . . " and to establish *"the following provisions* . . . for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in [military] service . . . . " 50 U.S.C.A. App. § 510 (West 1981) (emphasis added). This section provides no relief *beyond that specifically set forth in the remainder of the Act. Arkless v. Kilstein,* 61 F.Supp. 886, 888 (E.D. Pa. 1944) (since the Act makes careful provi-

sions for instances where Congress thought a serviceman's civil rights should be protected, the courts should not indulge in judicial legislation by expanding the Act beyond its terms).

Besides section 510, the only other provision of the Act which appellant cites (Jurisdictional Statement, at 5-7) is section 525. By its own terms, this section does not apply to statutes such as California Civil Code § 48a. Section 525 provides that:

> STATUTES OF LIMITATIONS AS AFFECTED BY PERIOD OF SERVICE
>
> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation or order *for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government* by or against any person in military service .... nor shall any part of such period which occurs after the date of enactment ... be included in computing any period now or hereafter provided by any law for the redemption of real property ....

50 U.S.C.A. App. § 525 (West 1981) (emphasis added). The language of this provision makes clear that it applies only to statutes setting a time limit for (1) bringing any cause of action or proceeding in any court or government agency or (2) the redemption of real property.

Unlike the statutes affected by section 525, California's correction statute does not limit the period in which appellant could have brought this or any other action, and it is not therefore a statute of limitations. See, *e.g.*, *People v. Kings County Development Co.*, 48 Cal.App. 72, 74-75, 191 P. 1004 (1920) (statutes which merely restrict a right are not statutes of limitations; only those statutes which provide that no action shall be brought unless brought

within a certain time are statutes of limitations). Section 48a also is not a statute of limitations because it does not bar appellant's causes of action. See, *e.g., Seid Pak Sing v. Barker*, 122 Cal.App. 93, 100, 10 P.2d 92 (1932) (defense that statute of limitations has run is a complete bar). Since Congress was specific about the only two instances in which section 525 applies, it cannot be expanded beyond its terms. *Arkless*, 61 F.Supp. at 888. Therefore, since section 48a is not a statute of limitations, it is not affected by the Soldiers' Act.

Not only is this conclusion supported by the plain language of section 525, it also is supported by the case law interpreting the Act. See, *e.g., Newman v. Newman*, 234 Ga. 297, 216 S.E.2d 79 (1975) (section 525 does not toll state statute that provides for automatic reverter of land title); *Smith v. Pettijohn*, 366 P.2d 633 (Okla. 1961) (section 525 does not toll period for acquisition of land title by prescription); *Rebar v. Rebar*, 165 Pa. Super. 341, 67 A.2d 598 (1949) (section 525 does not toll period of desertion necessary for right to divorce); *Thornley v. Superior Court*, 89 Cal.App.2d 662, 663-64, 201 P.2d 567 (1949) (section 525 does not toll three-year period of California Civil Procedure Code § 581a for serving summons, because section 525 does not toll time periods for procedural steps taken in prosecution of an action but only tolls those which limit the time for bringing any action or proceeding); *Schroeder v. Toedtemeier*, 184 Or. 561, 200 P.2d 606 (1948) (section 525 does not extend time set in contract reserving right to remove timber from land).

Finally, the purpose of the Act was to prevent prejudice to the legal rights of servicemen who were absent because they were on duty. *Keefe v. Spangenberg*, 533 F.Supp. 49, 50 (W.D. Okla. 1981). The main concern of the Act, prejudice to servicemen serving in far off places, is al-

ready accommodated by section 48a, which requires that a correction demand be served within twenty days *after knowledge* of the publication. Cal. Civ. Code § 48a (Deering 1971). Here, appellant knew about the publication the day after it occurred so the purpose of the Soldiers' Act would not be served by applying it to this case. PA 72.

Section 525 has consistently been limited to its explicit terms, and appellant has cited no conflict that would justify this Court's exercise of jurisdiction even if he had properly raised this issue in the California courts. There also is no basis, even should this Court reach the merits, for determining that the Soldiers' Act precludes application of California's correction statute.

III.

APPELLANT CAN RAISE NO SUBSTANTIAL FEDERAL QUESTION ABOUT CALIFORNIA CIVIL CODE § 48a BECAUSE CALIFORNIA'S CORRECTION STATUTE IS CONSTITUTIONAL

Even if appellant had properly raised federal constitutional challenges to California's correction statute in the Court of Appeal, that statute is constitutional. The California Supreme Court dealt with claims similar to those advanced by appellant and upheld the constitutionality of California Civil Code § 48a in *Werner v. Southern California Associated Newspapers,* 35 Cal.2d 121, 216 P.2d 825 (1950), *appeal dismissed,* 340 U.S. 910 (1951).

In upholding the correction statute's constitutionality, the California Supreme Court concluded that:

> There are at least two bases on which the Legislature could reasonably conclude that the retraction provisions of section 48a provide a reasonable substitute for general damages in actions for defamation against newspapers and radio stations, namely, the

> danger of excessive recoveries of general damages in libel actions and the public interest in the free dissemination of news.

35 Cal.2d at 126.

The California Supreme Court continued:

> . . . we cannot say that the Legislature could not reasonably conclude that the danger of excessive recoveries of general damages in libel actions justified limitation of recovery to special damages when a retraction has not been demanded and refused.
>
> Nor can we take exception to the second basis upon which the Legislature could justify its limitation of recovery to special damages, namely, the public interest in the free dissemination of news. In view of the complex and far-flung activities of the news services upon which newspapers and radio stations must largely rely and the necessity of publishing news while it is new, newspapers and radio stations may in good faith publicize items that are untrue but whose falsity they have neither the time nor the opportunity to ascertain. The Legislature may reasonably conclude that the public interest in the dissemination of news outweighs the possible injury to a plaintiff from the publication of a libel, and may properly encourage and protect news dissemination by relieving newspapers and radio stations from all but special damages resulting from defamation . . .

Id. at 128.

In addition to ruling on claims identical to the due process and equal protection claims which appellant apparently wishes to advance, the California Supreme Court

specifically rejected the argument that malice by the publisher affects the application of section 48a:

> Section 48a may also be sustained under the equal protection clause on the theory that its purpose is to encourage the dissemination of news. Although it extends its protection to those who may *deliberately and maliciously disseminate libels*, the Legislature could reasonably conclude that it was necessary to go so far effectively to protect those who in good faith and without malice inadvertently publish defamatory statements.

Id. at 134 (emphasis added). Appellant cannot and does not cite a single case suggesting that *Werner* is not sound, that California Civil Code § 48a is unconstitutional, or that there is any conflict on this point.

Instead, appellant's arguments in this Court about the correction statute involve interpretation of state — not federal — law. For example, appellant focuses on (1) the interaction between California's statute on libel *per se* and the California correction statute; (2) what the California legislature intended when it enacted section 48a; and (3) whether section 48a applies to "hot news." Jurisdictional Statement, at 37. Appellant's only alleged federal question as to the correction statute appears to be that a private figure libel plaintiff cannot constitutionally be required to prove special damages. Jurisdictional Statement, at 40-41.[10]

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[10]In the trial court, appellant asserted only that limiting him to his special damages would be "unfair and unconstitutional." PA 582-86. He never even specified what provision of the federal constitution, if any, would be violated by limiting him to his special damages. Although unclear, appellant appears to claim that he has a constitutional right of privacy and a constitutional right to a jury trial, and that these rights were infringed by the Court of Appeal ordering summary judgment for Times Mirror. See, *e.g.*, Jurisdictional State-

There are several problems with this argument. First, appellant has failed to even allege that any specific provision of the federal constitution protects private figure libel plaintiffs. Instead, appellant apparently believes that requiring him to prove special damages is unconstitutional because of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Jurisdictional Statement, at 35-36. *Gertz* recognized no federal constitutional protection for libel plaintiffs; it set a federal constitutional minimum on the degree of fault a private figure plaintiff is required to prove in certain defamation actions and the kind of damages that may be recovered in those actions. *Gertz* pertains to what the federal constitution requires, not to the very different question of what the federal constitution allows. The federal constitution certainly limits what remedies a state may give to a defamation plaintiff, but it does not prevent a state from enacting a statute that is more protective of free speech than is the federal constitution.

The trial court correctly determined that the federal constitution did not forbid California from adopting a correction statute that limits plaintiffs who fail to make a correction demand to their special damages. Even if this Court reaches the merits, this determination should be upheld.

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ment, at 35-43. As to the first claim, the right appellant asserts in this lawsuit is the right to reputation, which is not protected by the federal constitution. *Paul v. Davis*, 424 U.S. 693, 712-713 (1976) (interest in reputation is not a right which is protected by the federal constitution; moreover, the federal constitutional right of privacy does not encompass a claim that a state may not publicize a record of an official act). As to the second claim, this Court has long held that summary judgment does not infringe the federal constitutional right to trial by jury. *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315, 320 (1902).

CONCLUSION

For the reasons stated, appellant failed to properly raise in the Court of Appeal any substantial federal questions or federal challenges to the validity of any California statute. The Court of Appeal decision is based solely on state law. Review of that decision is therefore not within this Court's jurisdiction.

Dated: February 17, 1989

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California, 90017.

On February 17, 1989, I served the within Motion to Dismiss in re: "Willard G. Chrisman v. The Times Mirror Company" in the United States Supreme Court, October Term 1988, No. 88-844;

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Alexandra M. Kwoka, Esq.
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All Parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on February 17, 1989, at Los Angeles, California.

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